No. 91-798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION, and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In reviewing an adjudication conducted under an agency rule made final by a court of appeals in another circuit, recognized as settled by the reviewing circuit and relied on by all parties, including the agency, can the reviewing court *sua sponte* rewrite the rule in direct conflict with the rule previously made final, decide the case based on its own rule, and affirm the agency on a ground never advanced by the agency or argued by any of the hundreds of parties before the agency?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit were those in the caption, and, as intervenors: American Trading and Production Corporation, Amoco Production Company, Arco Oil and Gas Company, Bass Enterprises Production Company, Cabot Petroleum Corp., Champlin Exploration, Inc., Chevron U.S.A., Inc.; Conoco, Inc., Damson Oil Corporation, Eason Drilling Company and Sonat Exploration Co., Fina Oil and Chemical Company, Grace Petroleum, Inc., Graham-Michaelis Corporation, H.C. Federer, Philcon Development Co. and Sidwell Oil & Gas, Inc., J. Burns Brown Operating Company, John H. Hendrix Corp. *et al.*, Kaiser-Francis Oil Company and Leben Oil Corporation, Kaneb Exploration, Inc., Kerr-McGee Corporation, Lester Wilkonson, Marathon Oil Company, Maxus Exploration Company, MAPCO, Inc., MAPCO Oil & Gas Company, Santa Fe Minerals (a Division of Santa Fe International Corporation), Santa Fe-Andover Oil Company, Santa Fe Braun, Inc., Werner Oil, Inc., CNG Producing Company and Russell Freeman, Mesa Operating Limited Partnership d/b/a/ Continental Energy, Mobil Natural Gas, Inc., Mobil Producing Texas and New Mexico, Inc., and Mobil Oil Exploration and Producing Southeast, Inc., Neleh Gas & Oil Corp., Northern Natural Gas Company, a division of ENRON Corp., Okmar Oil Company, Petroleum, Inc., Phillips Petroleum Company and Phillips Natural Gas Co., Robert F. White, Robert L. Williams, Shell Western E&P, Inc., Shenandoah Oil Corporation, Tex/Con Oil & Gas Company and Lear Petroleum Corp., Texaco Inc., and Texaco Producing, Inc., Texaco International Petroleum Co. & Phoenix

Resources Co., Trees Oil Company, Union Pacific Resources Co., Wayman W. Buchanan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, South Dakota Public Utilities Commission, Minnesota Public Utilities Commission, and Peoples Natural Gas Company, a division of UtiliCorp United Inc., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the proceedings below on May 24, 1991, and the opinion and orders denying rehearing and rehearing en banc on August 20, 1991.

OPINIONS BELOW

The opinion of the court of appeals (6-22a)[1] is reported at 934 F.2d 346. The opinion of the court of appeals on rehearing (3-5a) is reported at 941 F.2d 1233. The opinions of the Federal Energy Regulatory Commission are reported at 48 F.E.R.C. ¶ 61,177 and 50 F.E.R.C. ¶ 61,288 (23a-49a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 24, 1991, affirming orders of the Federal Energy Regulatory Commission, issued on August 2, 1989, *Northern Natural Gas Co.*, 48 F.E.R.C. ¶ 61,177 (order aff'g initial decision), and on March 9, 1990, *Northern Natural Gas Co.*, 50 F.E.R.C. ¶ 61,288 (order denying reh'g). The court of appeals denied timely petitions for rehearing and for rehearing en banc on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, §§ 717(r), 3311(b)(9), and 3416 of Title 15 of the United States Code and § 270.205 of Title 18 of the Code of Federal Regulations are set forth in the Appendix.

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[1] The various opinions below are reproduced in the Appendix to the Petition for Writ of Certiorari. Citations with an "a" refer to that Appendix. Materials not included in the Appendix but reproduced in the Joint Appendix filed in the Court of Appeals are referred to as "___ J.A. Vol. ___".

STATEMENT OF THE CASE

Pursuant to a rule set by the Federal Energy Regulatory Commission (FERC or Commission), the purpose of the lengthy adjudicatory proceeding below was to determine whether collection of natural gas ceiling prices set directly by Congress in the Natural Gas Policy Act of 1978 (NGPA) is authorized in over 1200 pre-NGPA contracts between Northern Natural Gas Company (Northern), a natural gas pipeline, and its numerous gas suppliers (producers). Hundreds of millions of dollars are at stake.

Following the 1978 enactment of the NGPA, the Commission initially suggested that "area rate clauses" in existing long term contracts between pipelines and producers did not authorize NGPA rates. These area rate clauses are pricing provisions that typically provide for escalation to Commission-set area rates and do not expressly provide for Congressionally-set prices. In its Order 23 rulemaking,[2] FERC deferred to certain producer and pipeline assertions that, without explicitly saying so in their contracts, they intended, *at the time of contracting* for their area rate clauses, to provide for Congressionally-set prices. The Commission established Order 23 procedures through which the contracting parties could assert

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[2] Order 23, F.E.R.C. Stats. & Regs. ¶ 30,040 (March 20, 1979) (final regulations); Order on Rehearing of Order 23, F.E.R.C. Stats. & Regs. ¶ 30,052 (May 8, 1979) (order extending time and clarifying); Order 23-A, F.E.R.C. Stats. & Regs. ¶ 30,058 (June 15, 1979) (general rules and definitions); Order 23-B, F.E.R.C. Stats. & Regs. ¶ 30,065 (July 3, 1979) (final regulations); and Order on Rehearing of Order 23-B, F.E.R.C. Stats. & Regs. ¶ 30,073 (August 17, 1979) (amendment and clarification).

their underlying intent had been to require NGPA prices. To the extent that the contracting parties had no such intent, the alternative procedure of contract amendment to provide for NGPA prices remained available.[3] The Order 23 procedures recognized that a pipeline's decision to pay NGPA prices could affect its customers, from whom it would seek to recover the higher prices. Accordingly, they provided for customer challenges to the contracting parties' claims and for evidentiary hearings at which the contracting parties would bear the burden of proof.

In 1981 the Commission's Orders were, "in the main" and as relevant here, upheld by the Fifth Circuit, *Pennzoil Co. v. FERC*, 645 F.2d 360, and upon the denial of certiorari became final, 454 U.S. 1142 (1982). In 1987 these rules were recognized as "settled" by the District of Columbia Circuit in *Associated Gas Distribs. v. FERC*, 810 F.2d 226, 231.

Consistent with Order 23, in the agency proceeding below, the Commission and the Administrative Law Judge repeatedly declared that the parties' historical intent was the sole issue to be determined. The Commission's hearing order directed: "The intention of the parties in agreeing to [area rate clauses] is precisely the issue set for hearing." (50a). The Initial Decision stated: "The precise issue set for review is whether [Northern and its Producers] *intended* [area rate clauses] to trigger payment of NGPA ceiling prices when the contracts at issue were entered into."

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[3] The alternatives of (1) an area rate clause "intended" to authorize NGPA rates and (2) the provision for such rates by amendment are set forth in 18 C.F.R. § 270.205 (1991) (contractual authorization to collect NGPA rates). (63a).

Initial Decision, *Northern Natural Gas Co.*, 43 F.E.R.C. ¶ 63,015 (1988). The Commission's affirmance of the Initial Decision stated: "The intention of the parties in agreeing to the area rate clause was the issue set for hearing." (31a). In its Order Denying Rehearing the Commission stated: "The precise issue is whether the Parties intended area rate clauses to trigger payment of NGPA ceiling prices when the contracts at issue were entered into." (23a).

Consistent with Order 23, the extensive hearing focused exclusively on historical intent. Northern and its producers asserted the requisite historical intent; Petitioners challenged this claim through cross-examination and the use of documentary exhibits.

Consistent with Order 23, the Initial Decision "concluded that at the time they entered into the contracts the Parties intended the area rate clauses 'to trigger payments of all generally applicable ceiling prices established by federal authority.' " Order Denying Rehearing (26a). The Commission affirmed, concluding that the contracting parties had demonstrated the requisite historical intent. (49a). On review,[4] Petitioners sought to demonstrate that the evidence of record not only failed to support the requisite intent, but that the record compelled the conclusion that the parties did not intend to cover NGPA prices in the approximately 1200 contracts still at issue.[5]

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[4] Petitioners sought review pursuant to the judicial review sections of the Natural Gas and Natural Gas Policy Acts. (58a and 61a).

[5] Many contracts were eliminated at an early stage of the proceeding because they contained language indicating an intent to adopt gas prices set by Congress.

The court of appeals stated that finding an original intent to provide for NGPA prices was indulging in a "fiction," or finding a fact that "is hardly historical reality." (15a). The court declared that "if the issue were truly one of historical intent," the evidence and argument presented by Petitioners "might be telling blows." (19a). Rather than adhere to the test of historical intent as established by the Commission, and affirmed as settled by the courts, the court invoked a new "gap-filling" test: "whether the parties would have intended area rate clauses to authorize payment of NGPA rates if they had anticipated them at the time they negotiated the clauses." (16a). Without providing the parties the opportunity to make any argument or showing regarding its new test, the court affirmed the Commission, based on its own fact-finding under its newly devised standard.

On rehearing, Petitioners urged that the court's invocation of its new standard (the "gap" test) was an impermissible revision of the rule established in the Order 23 series, affirmed by the Fifth Circuit in *Pennzoil* and recognized as settled by the District of Columbia Circuit itself in *Associated Gas* and that the court's affirmance of the Commission on grounds never advanced by the agency violated this Court's *Chenery* rule. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Petitioners further urged that the court's finding that the claim to historical intent was a "fiction" dispositively resolved the issue adjudicated pursuant to Order 23, and required a reversal of the Commission's holding in favor of the contracting parties. Finally, Petitioners pointed out that even if the court's invocation of a new test was lawful, the court's *de novo* application failed the test of common sense.

For example, the Commission found, and the court's own decision reflected, that by 1985, when NGPA prices were well in excess of those at which gas could be purchased on the open market, the contracting parties had ceased to pay and to receive NGPA prices under hundreds of contracts at issue. Thus, in the absence of historical intent, the court of appeals filled a contract gap by imposing prices far higher than those which the contracting parties themselves had actually been employing for over six years.

On rehearing, the court conceded that the Commission's statement of the "controlling issue" appeared to "focus on historic intent". (4a). The court reaffirmed that contracting parties' claims to an intent to cover Congressional rates "would have been overwhelmingly contrary to fact." (5a). The court thereby made plain its finding that, by the test of historical intent, the contracting parties had failed to prove their case. Nevertheless, the court declared that the test established by the Commission, and followed by all the parties, would result in a "farce" and a "wild goose chase." (5a). Without citing any support in the language or logic used by the Commission, the court declared that it could "infer" that the historical intent language used by FERC was a "shorthand" for the hypothetical intent test newly imposed by the court, and reiterated its affirmance of the FERC decision under the new test. (5a).

REASONS FOR GRANTING THE WRIT

The traditional bases for grant of the writ pervade this case. The nation's foremost court of appeals in administrative matters has disregarded the most basic principles of administrative law, as established by this

Court and the courts of appeal. The District of Columbia Circuit's *sua sponte* invocation of a new rule to govern a decade long proceeding has destroyed statutory and precedential assurance that parties to an administrative proceeding can rely on the courts to apply the directly governing administrative rule. The court's action is especially egregious in light of the affirmance of the Commission's rule by another circuit, and this Court's denial of certiorari in that case. The court's declaration of a new rule by fiat, and its decision based on its fact finding under the new rule, has skewed the balance between the judicial and the administrative role developed by this Court over the course of the last half century. Further, the court's usurpation of administrative decisionmaking authority has deprived Petitioners of basic due process rights to present evidence and argument addressing the standard by which their case would be judged. Collectively, these errors would radically alter the delicate but previously undeniable line that has emerged to demarcate the roles of court and agency. If left uncorrected, the decision stands as a warning to those who must proceed before agencies that reviewing courts can at any time alter the basic rules of the game.

1. **The District of Columbia Circuit's *Sua Sponte* Revision of an Agency Rule Previously Made and Deemed Final by the Courts and Relied on During a Decade of Litigation Destroys the Predictability and Finality on Which the Administrative Process Depends**

In *Pennzoil Co. v. FERC*, 645 F.2d 360, *cert. denied*, 454 U.S. 1142 (1982), the Fifth Circuit, with exceptions not relevant here, affirmed the procedures

established by the FERC to determine whether NGPA ceiling prices could be collected under natural gas contracts entered into prior to the enactment of that law. The Fifth Circuit made clear that the test to be applied under the Order 23 rules is historical intent. "[T]he question is what *was* the parties' intent relative to the scope of the [area rate] clause." *Pennzoil*, 645 F.2d at 390 (emphasis added).

In 1987, the District of Columbia Circuit confirmed "that the validity of the Commission's Order No. 23 rulemaking series is settled by the Fifth Circuit's 1981 *Pennzoil* decision." *Associated Gas*, 810 F.2d at 231. *Associated Gas* summarized the Commission's conclusion in its Order 23 rulemakings—"[w]hether any *particular* clause constituted sufficient authority for charging [NGPA prices] . . . was a question of the parties' intent." *Id.* at 229.[6] The court, citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958), recognized that "we may not unsettle any issue settled by *Pennzoil*." *Associated Gas*, 810 F.2d at 231. *Tacoma* interpreted the finality language of the judicial review provision of the Federal Power Act, which is essentially identical to the language in the Natural Gas Act [NGA] and the NGPA.[7] *Associated Gas* explained that the "judicial review pro-

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[6] The court explained: "More particularly, the Commission established two presumptions: First, that the parties to a natural gas contract know currently *what their intent was when they executed the contract*; and second, that they are truthful in their assertions *regarding that intent*. Order on Rehearing Order 23-B at p. 30,475." *Associated Gas*, 810 F.2d at 230 n.1 (emphasis added, citations omitted).

[7] In Order 23, FERC acted pursuant to both the NGA and the NGPA.

visions of the NGA and NGPA, 15 U.S.C. §§ 717r(b), 3416(a)(4), authorize review petitions filed in a court of appeals within sixty days after the Commission acts on an application for rehearing; these review prescriptions render the court's judgment 'final, subject to review by the Supreme Court . . . upon certiorari or certification.' " *Associated Gas*, 810 F.2d at 231 n.3.

As *Associated Gas* recognized, the Fifth Circuit's affirmance of the Order 23 rule in *Pennzoil*, upon this Court's denial of review, definitively settled the Commission's rule. The court below lacked the authority to modify or set aside the Order 23 rule; but that is precisely what the court did. In lieu of the test of historical intent established by FERC in Order 23, the court substituted its own test of "filling gaps in the terms of an agreement with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed." (20a).

The historical intent test used by FERC and the parties and the "gap filling" test substituted by the court are diametrically opposed. The first seeks to determine the actual historical intent. The second starts with the conclusion that there was no actual historical intent.

Consistent with the historical intent test, at hearing the contracting parties filed testimony asserting that their actual historical intent was broad enough to encompass NGPA prices, and Petitioners sought to disprove the existence of such actual historical intent. The contracting parties never argued that there was a "gap" in the contracts—that there was no actual historical intent. The very suggestion of a gap would have fatally contradicted their sworn assertions to

actual historical intent. If the contracting parties had conceded, *ab initio*, that there was a gap, their path to NGPA prices would have been to amend their contracts, as permitted by the FERC, and not through the Order 23 procedures.[8]

On rehearing, the court conceded that the historical intent test was the test "literally" stated by the Commission and by Order 23, and that it had not been met. However, the court made equally clear that it would not follow that test. The court declared that, if "taken literally," the FERC's statement of the issue would "make the Commission's inquiry a farce," because in the decade prior to the NGPA's enactment, "no one . . . had suggested adoption of anything called 'NGPA' ". (4a). The court stated that:

> [e]ven if we expand the reference [to actual intent] to avoid that absurdity, and read it as encompassing national legislation setting rates in lieu of the Federal Power Commission's area rates, the working presumption of Order No. 23—essentially that the parties commonly formed an "intent" to cover such congressional rates—would have been overwhelmingly contrary to fact: only a relatively small proportion of actors in the natural gas market are likely in the early days to have contemplated the critical legislative develop-

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[8] In *Pennzoil*, 645 F.2d at 367-71, the Fifth Circuit summarized the development of the Order 23 rule. Order 23 was FERC's response to the gas industry's assertion that NGPA prices were historically intended; those contracting parties who could not assert such intent were free to amend their contracts. Contracts that were amended to expressly provide for NGPA prices were not at issue in the proceeding below.

ment (and thus been able to form an intent). (4-5a).

Once the court agreed with Petitioners that the alleged historical intent was a "fiction," it was required to hold that the contracting parties had failed to sustain their burden of proof. Instead, dissatisfied with what it acknowledged to be "the working presumption of Order No. 23," it changed the rule, in the process rewarding the very parties whose assertions of historical intent the court deemed a "fiction". (5a).

The court justified its revision of the final rule on grounds that adherence to the rule of historical intent would require a "wild goose chase". (5a). In the decade long administrative proceeding below all parties engaged in just such a "wild goose chase" on the premise that a rule made by an agency in a vigorously contested and highly visible rulemaking and repeatedly confirmed by the courts, could be relied on to mean what it plainly says.

The significance of the court's ruling for administrative law can be appreciated in the context of this case. The 1991 decisions below had their genesis in a law enacted by Congress in 1978. It was well understood that the NGPA would fundamentally alter federal regulation of natural gas, and the gas industry itself. The entire natural gas industry—producers, pipelines, consumer groups, and state commissions—participated in the rulemaking proceedings that set the ground rules for the implementation of the NGPA. The participants in the Order 23 rulemaking included numerous pipelines and producers; pipeline, producer and distribution company associations; and state commissions, including Petitioners Minnesota and South

Dakota Commissions. "[A]ll interested persons," the Fifth Circuit declared in affirming Order 23, "had ample opportunity to present their views." *Pennzoil*, 645 F.2d at 371-72. Petitioner state commissions participated in this rulemaking with full expectation that the resulting rules would be relied on to govern the disposition of hundreds of millions, indeed billions, of dollars.

Because the stakes were so high, the Petitioner state commissions recognized that litigation to pursue what they viewed as their consumers' rights would be costly, difficult, and long. However, along with the hundreds of other parties to the FERC proceeding[9] the state commissions undertook what would turn out to be a decade of litigation with the understanding that the FERC's rule, as affirmed in 1981 by the Fifth Circuit in *Pennzoil* and made final when the petition for certiorari was denied, would be the applicable rule governing their specific case. The legitimacy of this conviction was confirmed in 1987 when the District of Columbia Circuit itself declared the FERC rule to be settled. *See Associated Gas.*

In this case, it is Petitioners who suffer the effects of such misplaced reliance. In the future, if the court's extraordinary assertion of judicial authority to unsettle a "settled" rule is not addressed and corrected in this case, the costs of the resulting uncertainty will be borne by all who must evaluate commitments to participate in any administrative process.

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[9] Order No. 23 provided that all parties to the gas contracts at issue would automatically be made parties to Order 23 proceedings. Therefore, literally hundreds of gas producers were, by operation of the rule, parties to the proceeding before FERC.

2. The District of Columbia Circuit's Unilateral Decisionmaking Destroys the Principle of Deference on Which Congress and the Courts Have Erected the Administrative Process

In tandem with its *sua sponte* revision of a rule made final by statute and decision, the court below usurped the decisionmaking role long delegated by Congress to the administrative agencies. In a series of landmark decisions, this Court has periodically sought to demarcate the boundaries between court and agency, and to limit judicial intrusion into the agency's domain. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The appellate decisions below radically revise the boundaries identified by these cases; indeed, they leave the agency and participants before it as mere bystanders to the administrative process.

It is "a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such actions solely by the grounds invoked by the agency." *Chenery*, 332 U.S. at 196. "[T]he purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' " *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (1962), quoting *Chenery*. Even if the Commission had argued in the court of appeals that the test which

would save its decision was gap filling, the court would have been required to reject that argument.[10]

Here, the court did more than "propel" itself into the administrative domain; the court usurped that domain. In doing so, the court did not substitute a rationale for one that was not, but might have been, employed by the agency; it employed a rationale which was diametrically opposed to the rationale actually employed by the agency, and all parties before it.

In its Opinion on Rehearing, the court responded to Petitioners' argument that its opinion had violated *Chenery*. The court's answer consisted of asserting its view that the application of Rule 23 as written and as interpreted by the FERC would have resulted in a "wild goose chase" since what the producers were required to prove and what they testified to at length during the hearings was "overwhelmingly contrary to fact." (5a). Based on the court's own conclusion, it would have had no choice under *Chenery* but to find the Commission's actions "inadequate and improper;" the court would have been "powerless to affirm the administrative action." *See Chenery*, 332 U.S. at 196. It is disingenuous for the court to hold that the agency is speaking with the clarity that *Chenery* requires[11]

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[10] In fact, FERC's Brief in the court of appeals (FERC Brief at 1) identified the sole issue as whether FERC "reasonably concluded that 'area rates clauses' . . . were intended by the contracting parties to authorize payment of the maximum just and reasonable rate set by Congress" in the NGPA.

[11] "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must

and at the same time to claim that the agency is speaking in a "shorthand" that requires the court to impose a new and diametrically opposed test to confront "the reality of the case." (5a). Thus, the court's affirmance exceeded the limits on its powers imposed by *Chenery*.

In this case, it could not be clearer that the Commission and its counsel said exactly what they meant to say. The court does not dispute that the Commission, in its rule, its decisions, and its argument before the court plainly stated that the issue was original intent. Here, the regulatory history of the rule shows why the Commission's rule was stated as it was, and not as the rule the court would prefer. Here, the reviewing court could cite nothing in the record as the basis for substituting its rule for the rule it admits was expressly stated by the agency. If the clear and repeated statements of the issue by the agency could be disregarded, the decade of litigation pursued by all parties and the Commission in reliance on them could not. If the court's "explanation" is allowed to stand, nothing will be left of *Chenery* or *Burlington Truck Lines*. Courts will always be able to escape from *Chenery* or *Burlington Truck Lines* by asserting that they are merely "inferring" what the agency or the agency's counsel meant to say.

Once the transparent deficiency of the court of appeals' lip service to *Chenery* is considered, the decisions below amount to the assertion that no deference whatsoever need be paid to the agency. As such, the decisions are a frontal assault on all of this Court's

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be precise from what the agency has left vague and indecisive." *Chenery* 332 U.S. at 196.

landmark decisions requiring judicial deference to agency decisionmaking. *See, e.g., Chevron.* Here, even assuming that the Order 23 rule were not final, and the court was therefore free to consider the reasonableness of the rule requiring historical intent, then, if the court found that rule unreasonable, it would still be obligated to remand to the agency for application of the new standard. The court did not even concede this degree of deference.

The court's unilateral rush to judgment under its new rule further highlights the wisdom of the deference to the agency provided for by a long and consistent line of judicial precedents. On rehearing, Petitioners showed that even if the court were somehow correct in its opinion that the gap-filling test was appropriate, the court's *de novo* application of the test was—by the test of common sense—remarkably at odds with the undisputed facts of record. The court's decision to fill the contract "gap" with NGPA prices had the direct and most implausible effect of imposing prices that are well above the price which the contracting parties, in fact, bargained for at arm's length when they had actual knowledge of the NGPA. The price imposed by the court is also well above the prices which the parties have, in fact, long been paying and receiving under the contracts at issue.[12] From

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[12] In affirming based on the "gap" test, the court of appeals appeared to focus on the evidence as to course of performance in the payment of NGPA prices. (17-19a). The Commission found, and the court's own decision reflects, that when the gas market changed in the mid-1980's, Northern ceased paying and producers ceased receiving NGPA prices under numerous contracts in the case. *See* 46a and 17-18a. The record further shows that upon the enactment of NGPA, Northern, with knowledge of that

the vantage of the equitable considerations which are a central part of "gap filling" analysis, the court provided a windfall to the very contracting parties whose testimony as to actual intent it found to be a fiction.[13] The court of appeals did not address Petitioners' arguments under the new standard. The agency was never given the opportunity to do so.

The court's refusal to recognize the agency's rightful decisionmaking role was matched by a refusal to provide the minimal due process accorded participants

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law, (1) refused to enter into unequivocal commitments to contracts at NGPA prices, (*See, e.g.*, Exhibit P-R-37, Pt. III J.A. Vol. 2 at 1838) and (2) refused requests by producers to amend pre-existing contracts to expressly provide for NGPA prices, absent new consideration. (*See, e.g.*, Exhibit P-R-25 at item 31, Pt. III J.A. Vol. 2 at 1832.) Thus, actual performance does not support the conclusion which the court reached on the purported basis of actual performance.

[13] As stated by Professor Farnsworth, on whom the court relied, "basic principles of justice [should] guide a court in extrapolating from the situations for which the parties provided to the one for which they did not." E. Allan Farnsworth, *Contracts*, § 7.16, at 524 (1982). The court appeared to assume that, absent NGPA prices, the contracting parties would have been limited to a confiscatory, pre-1979 price pursuant to the Natural Gas Act. (13a). In fact, the governing NGA prices contained escalation provisions. Thus, the rate for "1975-76 vintage" gas has escalated at the rate of one cent per quarter from a base of $1.42 per Mcf (thousand cubic feet). *See American Pub. Gas Ass'n v. FERC*, 567 F.2d 1016, 1025 (D.C. Cir. 1977) *cert. denied* 435 U.S. 907 (1978). The current rate is in excess of the current market price (*See, e.g., Gas Daily*, November 1, 1991, at 1-2, which with some exceptions, shows prices in the $1.50 - $1.80 perMcf range) and substantially below the current NGPA Section 108 price ($6.88) and post-1974 Section 104 price ($3.14) which the court's decision mandates. 18 C.F.R. § 271 (1991).

in agency proceedings. The first indication that the historical intent standard would not be applied and that the decision would turn upon gap filling appeared in the decision of the court of appeals. The parties were thus deprived of notice and hearing in violation of the Administrative Procedure Act and Due Process.

In *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), the court held:

> The Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing "shall be timely informed of. . .[the] law asserted." 5 U.S.C. § 554(b)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard. . . . Supreme Court cases suggest that such notice and opportunity to meet the new standard is a constitutional imperative of due process as well.

Id. at 835 (citations omitted). The court went on to state that where the change in standard is such "that additional facts of a different kind may now be relevant for the first time, litigants must have a meaningful opportunity to submit conforming proof." *Id.* at 835.

In *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968), the court held:

> it is well-settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change. . . .
>
> By substituting an issue as to the books' *content* for the one framed by the pleadings, effectiveness of the books' ideas and suggestions, the Commission has deprived petitioners of both notice and hearing on the substituted issue.

Equally clearly, the decision here has deprived Petitioners of both notice and hearing on the substituted issue. Due process "condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utils. Comm'n of Ohio*, 294 U.S. 63, 71 (1935). Due process should not be omitted because the court believes it can perceive better what the agency should have done. Where, as in this case, due process was violated, the result is not only deprivation of the Petitioners' rights but also the expansion of the reviewing court, retroactively, into the administrative process.

CONCLUSION

As the National Association of Regulatory Utility Commissions (NARUC), which includes in its membership virtually every state public utility regulatory agency in the nation, asserted below in support of rehearing, state commissions and all others who expend limited resources on participation in federal regulatory proceedings must have confidence that the basic rules of administrative law—finality, deference, due process—will be followed so that these governmental agencies can fulfill their responsibilities efficiently and in an orderly way. Consistent with that

policy, this Court has been wary where the courts have attempted to encroach on those duties expressly reserved to the federal administrative agencies.

The decision below destroys, in an insidiously appealing way, the consistent line of cases that have settled the boundaries between agency and court. It silences agency opposition by affirming the agency. Nevertheless, its potential for creating chaos is evident. The potential for uncertainty and *de novo* review at the appellate level presents a fatal attraction for every litigant. From the judiciary's viewpoint, this will increase the likelihood that some administrative cases that otherwise should have been considered final will be appealed to the courts, since results can vary widely if new and different rules can be created during judicial review. From the parties' viewpoint, the regulatory process will become a nightmare of uncertainty with wasteful expenditures of time and money and little to guide state commissions and the untold other citizens, businesses and public agencies who must engage in the large-scale economic litigation that is brought before the federal regulatory agencies. The writ should be granted to bring the law of the Court of Appeals for the District of Columbia

Circuit in accord with the precedents established by this Court and applied in all other circuits.

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Respectfully submitted,

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